IN THE HIGH COURT OF BOMBAY AT GOA.

LETTERS PATENT APPEAL NO. 19 OF 2001.

Mr. Naresha Naraina Sirodcar,
r/o Pequeno Duler, H. No. 27/2,
Mapusa. ... Appellant.

Versus

Mrs. Geeta Naresha Sirodcar,
r/o Xelpem, Duler,
Mapusa. ... Respondent.

Mrs. A.A. Agni and Mrs. A. Dessai, Advocates for the Appellant.

Mr. S.D. Lotlikar, Senior Advocate with Mr. N.A. Manerkar, Advocate for the Respondent.

Coram : F.I. REBELLO AND
P.V. HARDAS, JJ.

Date : 16th July 2003.

ORAL JUDGMENT (PER HARDAS, J.)

The appellant, who was the respondent in First Appeal No. 57 of 1995, has filed the present appeal challenging the Judgment and Decree passed by the learned Single Judge, dated 2nd/3rd August 2001, allowing the appeal filed by the respondent herein/appellant before the learned Single Judge.

2. The facts as are necessary for the decision of this Letters Patent Appeal are set out hereunder:-

The appellant herein had filed a suit for divorce, which was registered as Special Civil Suit No. 193/1985/A. In the said suit, the appellant, who was the plaintiff before the Civil Judge, Senior Division,

Mapusa, had stated that the respondent herein was married to him at Mapusa, Bardez, Goa on 20th May 1981 and their marriage was registered with the Civil Registrar of Bardez at Mapusa against entry no. 283 of the Marriage Registration Book for the year 1981. It was also stated that from the wedlock a son was born to them on 19th March 1982. The grounds for seeking divorce, inter alia, were (1) on the evening of 30th August 1981, on which date the appellant had invited two of his friends at his house to celebrate his birthday, on being informed of the visit of his two friends, the respondent wife started shouting that her house was not a hotel and refused to cook and did not allow the appellant to entertain his friends. The respondent wife had insulted the appellant in the presence of his friends and called him a 'drunkard' and a 'womanizer'; (2) on one occasion when the appellant alongwith his sister had visited the respondent in the hospital after she had given birth to a son, the respondent started insulting her husband in the presence of other patients and asked him why he had come to see her? Thus, because of the behaviour of the respondent wife, it was alleged that mental tension was caused to the appellant; (3) because of the irretrievable break down of the marital ties, the appellant had alleged that the respondent wife had refused to have sexual intercourse with him and since the birth of the child they did not have any

sexual relations and (4) because of the break down of the marriage, the respondent wife refused to have food with the appellant and his family members and started maintaining a separate kitchen and exclusively living in one of the rooms. In order to salvage the marriage, the appellant had requested one of his friends to talk to the respondent wife and persuade her to live peacefully in congenial harmony with him. However, when the appellant's friend came to the house, the respondent wife flared up and falsely accused the appellant of being a drunkard and a womanizer. In this background, the appellant had claimed that the marriage between him and the respondent had completely broken down and it was impossible for him to reside with the respondent wife.

3. The respondent wife filed her written statement denying all the allegations levelled against her by the appellant. On the basis of the pleadings, the learned trial Court framed the following issues:- (1) whether the defendant ill-treated, abused and insulted the plaintiff on various occasions; (2) whether the defendant refused to have sexual intercourse with the plaintiff after the birth of the child; (3) whether the acts of the defendant caused 'injuria graves' and (4) relief?

4. The appellant examined himself as P.W.1 and

also examined Girish Divkar as P.W.2 and Vinayak Karapurkar as P.W.3. The respondent did not either examine herself or examine any other witness in her defence. The learned trial Court, on consideration of the evidence adduced by the appellant herein, answered issue no. 1 in the affirmative and answered issue no. 2 in the negative. A finding in the affirmative was also written in respect of issue no. 3. Thus, the learned trial Court, by its Judgment and Decree, decreed the suit filed by the appellant and dissolved their marriage under Article 4(4) of the Law of Divorce.

5. The respondent wife herein, being aggrieved by the Judgment and Decree of the learned trial Court, filed First Appeal No. 57 of 1995 in this Court. The learned Single Judge, in paragraph 14 of his Judgment, dated 2nd/3rd August 2001, held that even assuming that the defendant wife had off and on berated the husband and also in the presence of others by referring to him as drunkard and womanizer, the question is whether it could be said that, that by itself would constitute mental cruelty sufficient to result in irretrievable break down of the marriage? The learned Single Judge, after consideration of the evidence, in paragraph 18 of his aforesaid Judgment, returned a finding that the appellant herein had not been able to prove issues 1 and 3 and, therefore, the Judgment and Decree of the learned

trial Court was unsustainable. The appellant herein, therefore, being aggrieved by the Judgment and Decree passed by the learned Single Judge allowing the appeal filed by the respondent wife and dismissing his suit for divorce, has filed the present Letters Patent Appeal.

6. With the assistance of the learned counsel for the parties, we have perused the plaint, written statement and the evidence of the appellant and his witnesses examined before the learned trial Court. Mrs. Agni, the learned counsel appearing on behalf of the appellant, has urged before us that the evidence of the appellant corroborated by the evidence of his friends P.W.2 and P.W.3, sufficiently establishes that the respondent wife had ill-treated the appellant and had caused mental cruelty to him. Therefore, according to the learned counsel for the appellant, the appellant had established that he was treated with mental cruelty and the findings recorded, by the learned Single Judge, are contrary to the evidence on record. Mrs. Agni, the learned counsel for the appellant, has also urged before us that assuming that the evidence led by the appellant in respect of issues 1 and 3 fell short of establishing and proving those issues, the evidence of the appellant that the respondent wife had refused to have sexual intercourse with him was sufficient to prove issue no. 2, particularly so, when the respondent wife did not

step into the witness box or rather had not examined herself to repel the evidence led by the appellant. According to the learned counsel for the appellant, the fact that a wife refused to have sexual intercourse with her husband constitutes mental cruelty and, as such, the appellant was entitled to have a decree in his favour dissolving the marriage.

7. Mr. Lotlikar, the learned senior counsel appearing on behalf of the respondent wife, has submitted before us that the learned Single Judge, after appreciating all the evidence, has rightly disbelieved the evidence of the appellant and his witnesses in respect of issues 1 and 3. According to the learned counsel for the respondent wife, the acts complained of bear no proximity to the date of filing of the suit and, as such, the appellant by his conduct, assuming he has successfully established those instances, has condoned the act of cruelty. According to the learned counsel for the respondent wife, the evidence of the appellant and his witnesses in respect of issues 1 and 3, apart from being discrepant, tasks human credulity for its acceptance. In respect of issue no. 2, the learned counsel for the respondent wife, has submitted that the allegations in the plaint, reiterated in the evidence of the appellant, are extremely vague, giving no details, and, as such, were rightly rejected by the learned trial

Court and the learned Single Judge.

8. The appellant in his evidence refers to the incident of 30th August when the respondent wife is alleged to have in a fit of rage asked the appellant not to invite his friends and questioning him whether the house was a hotel. The appellant has deposed about the respondent wife repeatedly calling him as a womanizer and a drunkard. The instance complained of is nearly three years prior to the filing of the suit for divorce. Though, it is a fact that P.W.3 Vinayak Karapurkar was not cross-examined on behalf of the respondent wife, according to us, these allegations by themselves are not enough to come to a conclusion that the respondent wife had caused or treated the appellant with mental cruelty. Since the instance complained of bears no proximity to the date of filing of the suit, according to us, there appears to be condonation of the acts of mental cruelty in respect of issues 1 and 3. We are, therefore, in agreement with the findings of the learned Single Judge that the appellant has not been able to establish the acts complained of in support of the evidence in respect of issues 1 and 3.

9. Turning to issue no. 2, that the respondent wife had refused to have sexual intercourse with the appellant, the learned trial Judge seems to have

mechanically rejected this part of the evidence of the appellant on the ground that the appellant had not led any 'supportive evidence' and, therefore, according to the learned trial Court, in the absence of any supportive evidence, it could not be held that the appellant had established that the respondent wife had refused to have sexual intercourse with him. The learned Single Judge endorsed the findings of the learned trial Court in respect of issue no 2. In paragraph 13 of the plaint, the appellant had alleged that the respondent wife had refused to have sexual intercourse with him after the birth of the child. Same allegation is repeated in paragraph 16 of the plaint. The respondent wife, in her written statement in paragraph 13, has denied the contents of the plaint and has stated the same to be a figment of imagination invented by the appellant to prepare a ground for divorce. It is once again reiterated in respect of paragraph 16 of the plaint. The appellant in his evidence has stated: 'after birth of the child we had no sexual relation and she also refused to me to keep relation as husband and wife'. There is no effective cross-examination of the appellant in respect of his statement that the respondent wife, after the birth of the child, had refused to have sexual intercourse with him. The respondent wife had also not examined herself to disprove what the appellant had stated in his

evidence.

10. From the evidence it appears that in 1985 attempts were made to bring about an amicable settlement but, those attempts proved to be futile, as a result of which, the suit for divorce came to be filed. The parties have been litigating since the year 1985 and it appears that, at the time of filing of the suit, the marriage between the parties had irretrievably broken down with no semblance of a chance of bringing about any reconciliation. The findings of the learned trial Court, which were endorsed by the learned Single Judge, that the appellant ought to have led supportive evidence in respect of issue no. 2 is wholly unsustainable. The appellant had stated that the respondent wife had refused to have sexual intercourse with him. It is incredulous to ask the appellant to give details like dates, time, etc., when the respondent wife had refused to have sexual intercourse with him. It is also incredulous to expect any supportive evidence in respect of this allegation. The averment to this effect in the plaint reiterated in the evidence by the appellant, which virtually went unchallenged in the cross-examination, coupled with the fact that the respondent wife did not examine herself to dispel this part of the evidence, according to us, was sufficient for proving issue no. 2. The continuous refusal of the

wife to have sexual intercourse with the husband, certainly amounts to mental cruelty, as the appellant, who was enjoying normal health, was likely to feel a sense of anguish and frustration in being deprived of co-habitation that every married person expects to enjoy. It is also apparent that, if this was the conduct of the respondent wife, the irretrievable break down of the marriage was inevitable. Therefore, according to us, the appellant was entitled for a decree of divorce on the ground that the respondent wife, by refusing to have sexual intercourse with him, had treated the appellant with cruelty, which, ultimately, led to the irretrievable break down of the marriage.

11. Mrs. Agni, the learned counsel appearing on behalf of the appellant, has stated that the appellant, without prejudice to his rights, is willing to pay to to the respondent wife an amount of Rs. 80,000/-. We, accordingly, permit the appellant to deposit in this Court an amount of Rs. 80,000/- within 12 weeks from today. On such deposit being made, we permit the respondent wife to withdraw the said amount, also without prejudice to any of her rights.

12. In the result, therefore, the Letters Patent Appeal is allowed. The findings of the learned trial Court and the learned Single Judge in respect of issue

no. 2 is quashed and set aside. The appellant is entitled for a decree of divorce as passed by the learned trial Court. In the circumstances, there shall be no order as to costs.

(F.I. REBELLO)
JUDGE.

(P.V. HARDAS)
JUDGE.

ed's.